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No. 82-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH EDISON COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

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QUESTIONS PRESENTED

As part of the Staggers Rail Act of 1980, Congress created a "zone of rate flexibility" which was intended to enable railroads to respond to inflationary cost increases through immediate rate adjustments. In Section 203 of the Staggers Act, 49 U.S.C. § 10707a, Congress provided that (with certain specific exceptions) a railroad "may increase any rate" so long as "the increased rate is not greater than the adjusted base rate for the transportation involved." The "adjusted base rate" was defined to be the "base rate" in effect at a stated time, "multiplied by the latest rail cost adjustment factor" published by the Interstate Commerce Commission. Pursuant to Section 203, the Commission conducted a proceeding and issued a decision adopting procedures for quarterly publication of the Index of Railroad Costs to be used in developing the quarterly rail cost adjustment factor. In its decision the Commission decided not to require productivity adjustments in determining the rail cost adjustment factor because of the unreliability of productivity measures and the risk of overdeflating the cost index at a time when railroads are suffering from revenue inadequacy.

The Court of Appeals affirmed, holding that the Commission was not required by Section 203 to impose productivity adjustments on the cost index, and that the Commission had not abused its discretion in deciding not to do so. The court added that it expected the Commission, in accordance with its stated intentions, to continue to review the accuracy of the index, and to consider possible adjustments to reflect productivity gains. Following the court's decision, the Commission initiated a special rulemaking proceeding, Ex Parte No. 290 (Sub-No. 4), in which it is now considering the possible use of a productivity adjustment in determining the rail cost adjustment factor.

The issues which Petitioners ask this Court to review are primarily *factual* issues. They are:

1. Whether the index of railroad costs adopted by the Commission, in the decision affirmed by the Court of Appeals, substantially overstates actual railroad cost increases; and

2. Whether, therefore, the Commission acted arbitrarily or abused its discretion in declining to include a productivity adjustment as part of the rail cost recovery procedure.

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BRIEF IN OPPOSITION FOR THE RESPONDENT ASSOCIATION OF AMERICAN RAILROADS

This brief is submitted on behalf of the Association of American Railroads,[1] in opposition to the petition for a writ of certiorari filed by Commonwealth Edison Company, et al.

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[1] The Association of American Railroads is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada, and Mexico. The Class I member railroads operate 92 percent of the total trackage, employ 94 percent of the workers, and generate approximately 97 percent of the total freight revenues of all railroads in the United States. In addition to the Class I railroads, the AAR represents the interests of several hundred smaller railroads, terminal companies and switching lines.

The Association participated in this case both before the Interstate Commerce Commission, to which it submitted Statements of Fact and Argument, and the Court of Appeals, in which it appeared as Intervenor-Respondent.

STATEMENT OF THE CASE

Petitioners' arguments, even if they had merit, would not warrant grant of a writ of certiorari under the standards established by this Court (Rule 17). There is no conflict among the circuits and no legal issue of general importance in this case that needs to be resolved by this Court. Indeed, the petition raises no substantive legal issue at all. The arguments advanced by Petitioners—that the rail cost index adopted by the Interstate Commerce Commission overstates actual cost increases, and that the Commission abused its discretion in deciding not to require a productivity adjustment as part of the indexing procedure—turn on factual issues. These issues are the subject of a special proceeding, Ex Parte No. 290 (Sub-No. 4), *Railroad Cost Recovery Procedures—Productivity Adjustment*, now being conducted by the Commission. The lack of any need for this Court's review in this case is underscored by the fact that of the eleven sets of shipper parties challenging the Commission's orders in the Court of Appeals, only one now seeks review by this Court.

A. Background of the Staggers Rail Act of 1980

Section 203 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, was enacted by Congress to enable the railroads to protect themselves against inflationary cost increases by implementing rate increases with minimal regulatory interference or delay. Congress found, in enacting the Staggers Act, that the revenues of the railroad industry are inadequate. *See* Pub. L. No. 96-448, Section 2. A principal reason why railroad revenues are inadequate is that railroad revenues have not kept pace with inflationary cost increases. For example, between 1969 and 1978, rail costs increased 147 percent while revenue per ton-mile grew by only 76 percent. *See* H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 106 (1980).

The deteriorated financial condition of the railroad industry underscored the importance of enabling the railroads to recover their increased costs promptly and with minimal regulatory intervention. However, until enactment of the Staggers Act the only broad-scale rate adjustment mechanism available—the so-called "general rate increase"—was cumbersome and time-consuming.[2] The basic flaw in this procedure resulted from the protracted nature of general rate proceedings: general rate increases frequently were not permitted until many months after the railroads had incurred the costs justifying such increases. However, the Interstate Commerce Commission could not authorize retroactive adjustments of rates to recover such increasing costs. Accordingly, the revenues lost by railroads as a result of delays in general rate increase proceedings could never be recovered.[3]

B. Section 203 of The Staggers Act

In enacting Section 203 of the Staggers Rail Act of 1980, Congress created a regulatory mechanism to enable railroads to protect themselves against inflationary cost increases through immediate rate adjustments. Section 203, now codified at 49 U.S.C. § 10707a, directs the

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[2] The evidentiary and procedural requirements imposed by the Commission's regulations governing general rate increase procedures (former 49 C.F.R. § 1102) were extraordinarily complex and burdensome. Satisfying these regulations frequently required railroads to produce thousands of pages of evidence and spend millions of dollars and thousands of manhours for each general rate increase. (Joint Appendix (hereinafter "J.A.") at 210, 419).

[3] The Senate Committee on Commerce, Science and Transportation noted in its report on the Staggers Act that "[t]he railroads' financial difficulties may be attributed, in part, to the time lag involved in recovering cost increases." S. Rep. No. 96-470, 96th Cong., 1st Sess. 19 (1979). The record before the Commission indicates that between June 1978 and July 1980 this time lag inflicted revenue losses on the railroad industry amounting to more than $3.3 billion. (Verified Statement of Dr. Harvey Levine, J.A. 418.)

Commission to develop, maintain and publish an index of rail costs. Section 203 also provides that rate increases no greater than changes in the cost index are immune from challenge by shippers or the Commission. (Section 203, 49 U.S.C. § 10707a(a), (b).)

The amount of the inflation adjustment authorized by Section 203 is determined by multiplying the level of a rate as of a specified date (the "base rate"[4]) by the change in the index since that date (the "rail cost adjustment factor"[5]). The resulting rate level is known as the "adjusted base rate." (49 U.S.C. § 10707a(a)(2)(A).) Congress provided that the railroads "may increase any rate over which the Commission has jurisdiction . . . . so long as the increased rate is not greater than the adjusted base rate . . . ." (49 U.S.C. § 10707a

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[4] The "base rate" is defined at 49 U.S.C. § 10707a(a)(1)(A) as follows:

> " 'base rate' means, with respect to the transportation of a particular commodity (i) for the 24-month period beginning on October 1, 1980, the rate in effect on October 1, 1980, (ii) for the 24-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and (iii) for the 5-year period beginning October 1, 1984, and for each subsequent 5-year period, the rate in effect on the first day of the applicable 5-year period."

[5] The "rail cost adjustment factor" is defined at 49 U.S.C. § 10707a(a)(2)(B) as follows:

> "(B) Commencing with the fourth quarter of 1980, the Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor), and the denominator of which is the same index for the fourth quarter of 1980, or for the fourth quarter of 1982 or for the fourth quarter of every fifth year thereafter, as appropriate."

(b)(1).)[6] The Conference Committee expressly recognized that as a result of this provision, railroads may "change a rate to conform to the 'adjusted base rate' at any time without challenge." (H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 93 (1980); *see* 49 U.S.C. § 10707a (b)(1) & (2).)

One of the issues given extensive consideration by Congress in drafting Section 203 was the role, if any, of railroad productivity trends in the determination of the rail cost adjustment factor. Section 203 evolved from Section 103 of S. 1946, the Senate bill which ultimately became the Staggers Act. As originally introduced, Section 103 of S. 1946 would *not* have required that the index contain *any* adjustment for productivity changes. During the hearings on S. 1946, shipper representatives testified that Section 103 should be amended to require that the cost index reflect numerous changes in productivity—including those resulting from changes in traffic volume, labor productivity, fuel economy, and traffic mix.[7]

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[6] Section 203 also permits railroads, under certain circumstances, to increase individual rates by as much as four or six percent annually *above* the rate of inflation without risk of suspension by the Commission. This limited protection is subject to several qualifications, however, and shippers may file complaints attacking the increases under 49 U.S.C. § 11701(b). (*See* 49 U.S.C. § 10707a(c)-(e).)

[7] *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 367-557 (1980). For example, Edwin M. Wheeler, President of the Fertilizer Institute (a petitioner in the Court of Appeals) proposed the following amendment to the bill to ensure that these various factors would be "considered in determining the index" (*id.* at 399):

> "Sec. 103 Rail cost adjustment increases
>
> "(f)(3) * * * (add at end of paragraph): This rail cost adjustment factor *shall be adjusted to reflect changes in the productivity of labor, and changes in the volume and mix of traffic.*"

Following these hearings, the Senate Commerce Committee reached a compromise in which it rejected the shipper-proposed mandatory productivity adjustments, but provided for "*appropriate* adjustments to reflect the quality and mix of material and labor . . . ." (*See* S. Rep. No. 96-470, *supra*, at 52; emphasis supplied.)

The Senate Commerce Committee's version of Section 103 was included in the bill which was passed by the Senate and referred to the Conference Committee on S. 1946. The Conference Committee included the Senate language in Section 203 of the Staggers Act, adding an additional phrase:

> "Commencing with the fourth quarter of 1980, the Commission shall . . . . publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect *the changing composition of railroad costs, including* the quality and mix of material and labor) . . . ." (H.R. Rep. No. 96-1430, *supra*, at 8; additional phrase underscored.)

Thus, the Conference Committee adhered to the approach adopted by the Senate; instead of requiring a broad range of adjustments to reflect changes in productivity (as advocated by shipper representatives), the Conference Committee settled the matter by providing that the quarterly index adopted by the Commission should include "appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor . . . ."

C. Proceedings Before The Commission

Two months after the Staggers Act became effective, the Commission issued a Notice of Proposed Rulemaking ("NPR") to implement Section 203 of the Staggers Act. (Ex Parte No. 290 (Sub-No. 2), *Procedure Governing General Rate Increase Proceedings; Railroad Cost Recov-*

ery Procedures, 45 Fed. Reg. 81217 (December 10, 1980).) In this NPR, the Commission proposed to comply with Section 203 by adopting a modified version of the existing rail cost index developed by the Association of American Railroads (AAR), and by using this index as the basis for inflation-based rate increases under Section 203. (*Id.* at 81217-18.)

The Commission explained in the NPR its reasons for proposing to adopt the AAR index and described how it planned to monitor and audit the indexing process. The Commission also explained why, in its view, the index need not include productivity adjustments other than adjustments to reflect the changing composition of rail costs. (45 Fed. Reg. at 81218).

After receiving a further round of written comments from interested parties, the Commission served its final decision in Ex Parte No. 290 (Sub-No. 2) on April 17, 1981. (364 I.C.C. 841; Pet. App.[8] A.) That decision, which was reviewed by the Court of Appeals below, adopted essentially unchanged the indexing procedures proposed in the Commission's earlier NPR. In its decision, the Commission further considered the productivity issue and reaffirmed its previous conclusion that Section 203 of the Act, in providing for "appropriate adjustments to reflect the changing composition of railroad costs . . .", required only adjustments to account for changes in the relative weighting of the cost components covered by the index.

Apart from adjustments to the weightings applied to the input costs, the Commission decided that no further adjustment was necessary. In particular, it rejected the shippers' contention that the AAR index, which was an index of the changing costs of *inputs* (such as labor, fuel, and materials), must be adjusted for productivity changes

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[8] The term "Pet. App." refers to the Appendices filed by Petitioners in this Court.

in order to produce an index of costs of *outputs* (such as unit cost per ton-mile). The Commission noted that the Act itself did *not* require such further adjustment (364 I.C.C. at 846; Pet. App. C-6).

> "At the outset, we note that the Rail Act does not specify whether an input cost index or an output cost index is to be used as the rail cost adjustment factor. Instead, the Rail Act leaves this matter up to the Commission, as a matter of policy, to be determined in a manner consistent with the purpose of the Rail Act as a whole."

In the absence of any *requirement* of a productivity adjustment in Section 203, the Commission noted the "methodological problems" of productivity measurement, and decided not to require any such adjustment—a decision which it believed was most consistent with "the purpose of Section 203", and which would permit the railroads "to neutralize the effects of inflation through rate increases with minimal regulatory intervention." (*Id.* at 846.)

On the date the Commission's decision was served, Western Coal Traffic League filed the first of eleven petitions for review of the decision.[9]

D. The Decision of the Court of Appeals

The Court of Appeals for the D.C. Circuit affirmed the Commission's decision. *Western Coal Traffic League* v. *United States*, 677 F.2d 915 (D.C. Cir. 1982) (Pet. App. A.) The court's decision addressed and resolved two ques-

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[9] The eleven groups of shippers filing petitions for review with the Court of Appeals were: Western Coal Traffic League; Fort Howard Paper Company; Commonwealth Edison Company, et al.; Edison Electric Institute; The Fertilizer Institute; Carolina Power and Light Company, et al.; Alabama Power Company, et al.; Chemical Manufacturers Association; Central Illinois Light Company, et al.; American Paper Institute, Inc.; and South Carolina Electric & Gas Co. (Pet. App. A-1 - A-4.)

tions: (1) whether the ICC correctly decided that Section 203 of the Staggers Act left the Commission discretion as to whether to make productivity adjustments in formulating its cost index; and (2) if Section 203 did not mandate productivity adjustments, whether the Commission acted reasonably in deciding not to adjust the AAR index to reflect productivity changes.

The Court of Appeals analyzed the first question in light of the express requirement of Section 203 that the cost index adopted by the Commission

> "be compiled or verified by the Commission, with *appropriate* adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor." (Emphasis supplied.)

Based on this language, the court rejected the argument that Section 203 *requires* that the index be adjusted to reflect productivity changes (Pet. App. A-18):

> "Since one critical issue in this case is whether estimates of productivity gains on a quarterly basis are feasible, CMA's contention that productivity is a cost factor, even if accepted, is insufficient to prove that a productivity adjustment is 'appropriate' and, therefore, statutorily mandated."

The court also rejected the argument that the legislative history of Section 203 compelled the Commission to make productivity adjustments (Pet. App. A-22):

> "In this case, the legislative record supports an inference that the committee redrafted section 203 in response to the shippers' testimony, but it collapses as a foundation for understanding how the committee chose to resolve the conceptual and methodological problems of cost indexing. It is possible that the committee sought to accommodate the shippers' concerns, viewing language on the quality and mix of labor and materials as a general formulation of the kind of adjustments needed to make an input index accurately reflect costs per unit of output. Alternatively, the committee may have sought to

> reaffirm the approach of the original bill, requiring only those refining adjustments that fit easily within an input methodology. Neither the committee's rejection of the bill's original language, nor its rejection of the shippers' proposed amendment provides a reliable basis for choosing between these two readings."

The court concluded that in light of the underlying purposes of Section 203, the Commission was *not* required to make productivity adjustments in its rail cost index (Pet. App. A-25):

> "Thus, while we agree with petitioners that the purpose of section 203 was to allow railroads to keep up with cost increases, we cannot conclude that this purpose mandates adoption of an output index regardless of the accuracy of such an index or the feasibility of designing it so as to allow railroads to obtain rate increases in a timely manner."

The court thus ruled that Congress, in enacting Section 203, had left to the Commission's discretion whether to make productivity adjustments in computing the rail cost adjustment factor.

The Court of Appeals then turned to the second question, whether the Commission had acted reasonably in declining to adjust the cost index to reflect productivity changes. The court noted that the record supported the Commission's assessment of "the unreliability of productivity measures." (Pet. App. A-28.) The court also concluded that "the record does *not* support the shippers' assertion that productivity will always grow at some minimum rate." (Emphasis supplied.) (Pet. App. A-28.) In light of these findings, the Court of Appeals found to be reasonable the Commission's decision not to adopt a productivity adjustment and thereby "risk the possibility of overdeflating the cost index at times when railroads are also suffering adverse effects of the business cycle." (Pet. App. A-31.)

In affirming the Commission's decision, the Court of Appeals noted with approval the Commission's "stated intention to review the index against current cost data, taking appropriate action in the event of overrecovery . . ." (Pet. App. A-31.)

E. Further Proceedings Before The Commission

In fulfillment of its "stated intention," the Commission on July 14, 1982, issued an "Advance Notice of Proposed Rulemaking" requesting comments on the possible use of a productivity adjustment in determining the quarterly rail cost adjustment factor, and proposals for measuring productivity and for implementing a productivity adjustment. Ex Parte No. 290 (Sub-No. 4), *Railroad Cost Recovery Procedures—Productivity Adjustment.* (47 Fed. Reg. 32176; Pet. App. E-1.) Comments are presently due to be submitted to the Commission on or before October 25, 1982.

ARGUMENT

Petitioners' request that this Court review the Court of Appeals' decision affirming the Commission's cost index procedures should be denied. The petition totally fails to satisfy the standards established by this Court for review on writ of certiorari. Rule 17 of the Rules of the Supreme Court states that certiorari will be granted "only where there are special and important reasons therefor," as "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this Court."

There is no conflict between the decision of the Court of Appeals below and that of any other court. Nor is there any question of federal law which need be resolved by this Court. The arguments made by Petitioners—that the cost index overstates actual cost increase, and that Commission should have adopted a productivity adjustment—are currently the subject of a special proceeding

being conducted by the Commission. (*See* Pet. App. E.) Petitioners and others thus have ample opportunity to present their evidence and arguments to the Commission with respect to the productivity issue.

Moreover, as explained below, the decision of the Court of Appeals affirming the Commission's order was clearly correct. Indeed, the basic arguments made by Petitioners are not legal arguments at all, but are instead premised on factual assertions which are totally unsupported, and which in some instances were explicitly considered and rejected by the Commission and the Court of Appeals.

Finally, Petitioners' contention that "in terms of its effect on shippers, this may well be the most important transportation case this Court has ever been asked to review" (Pet. 12) not only reflects an unenlightened view of this Court's history, but is belied by the fact that of the eleven sets of parties challenging the Commission's orders in the Court of Appeals, *only one* group is seeking review by this Court.

1. First, Petitioners assert that by not requiring the Commission to make a productivity adjustment, the Court of Appeals allowed the Commission to "adopt knowingly and deliberately an index that greatly overstates increases in costs." (Pet. 7.) Petitioners' assertion is both unsupported by the record and incorrect. The issue before the Commission was whether the use of an input cost index such as the AAR index (and such as the Producer Price Index and the Consumer Price Index issued by the United States Bureau of Labor Statistics) is appropriate to measure inflation in railroad costs—or whether, as the shippers asserted, the input index should be adjusted for productivity changes to produce what they termed an "output cost index." The railroads submitted extensive and detailed evidence to the Commission showing that use of an input cost index was appropriate, and that the AAR index was an accurate measure of the changing costs of railroad inputs, such as labor, fuel, and materials. The Commission concluded that the use of an input cost index was proper, and that the AAR index accurately measured

changes in the costs of such inputs (Pet. App. C-3 - C-4). Petitioners' contention as to deliberate cost overstatement is based on the implicit premise that the cost changes to be measured are those in outputs, rather than inputs—even though that premise was shown to be incorrect below, and was flatly rejected by the Commission; and the Commission's decision was affirmed by the Court of Appeals.[10]

Moreover, Petitioners' assertion that the absence of a productivity adjustment causes a "great" or "substantial" difference between the index of changes in input costs and output unit costs was the subject of controversy before the Commission. The railroads submitted evidence that Petitioners' assertion was not correct, and the Commission expressly rejected the methodology upon which Petitioners' assertion was premised.[11] Petitioners' conten-

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[10] The Court of Appeals held that the Commission's obligation "was to assure that the index did not contain unreasonable biases." (Pet. App. A-25 - A-26 n.27.) The court found that "[t]he Commission fulfilled this obligation by reviewing the AAR index's methodology and making appropriate adjustments to reflect the composition of railroad costs." (Pet. App. A-26.) Thus, Petitioners' contention that the index adopted by the Commission overstates costs is unfounded and was squarely rejected by the Court of Appeals.

[11] In support of their assertion that "[t]he uncontradicted evidence in the record is that the overstatement of cost [by the AAR Index] is substantial" (Pet. 7 n.6.), Petitioners refer to various cost indices indicating smaller annual increases in railroad costs than those reflected by the AAR Index. The comparisons relied upon by Petitioners are invalid. As Petitioners' *own cost witness* acknowledged, the comparisons in one instance rely on figures which do *not* reflect the effect of year-to-year changes in the mix of traffic (J.A. 816), and in other instances rely on indices which do not even relate to changes in *railroad* costs. (J.A. 819.) As the Court of Appeals correctly noted (Pet. App. A-17), no party proposed use of an index other than the AAR Index; the shippers merely sought to have that index adjusted to reflect productivity changes. Yet, the Commission found and the Court of Appeals affirmed that the record contains ample support for the conclusion that the methods suggested by shippers for measuring productivity changes produced distorted and unreliable figures, often due to the improper use of

tion that the Commission "knowingly" adopted a methodology that "greatly overstates" cost increases is thus both misleading and totally unfounded.

2. Petitioners also contend that the Court of Appeals, in reviewing the record with respect to the difficulties of accurately measuring changes in productivity, erred by substituting "its own views" for those of the Commission, and by affirming the Commission's decision on a ground upon which the Commission had not relied. (Pet. 8.) Petitioners assert that the Commission "conceded" that the development of productivity measures is "feasible," and that the Court of Appeals simply substituted its own factual findings as to the difficulties of measuring changes in productivity. (Pet. 7-8.) Petitioners' contention is again simply belied by the facts.

In its Notice of Proposed Rulemaking, the Commission advanced the proposition that "there is *no acceptable measure* of productivity available." (Emphasis supplied; 45 Fed. Reg. 81214; J.A. 601.) In its final decision (which was the subject of review below), the Commission did *not* find (or "concede") that the development of productivity measures is "feasible." Instead, although noting that the methodological problems of productivity management do "not preclude" the development of such measures, it observed that such problems were "grave,"; and

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the ton-mile as the single-factor measure of output. (*See* J.A. 511-15; 857-60.)

Petitioners' further contention that the "Western railroads" have "conceded" that the AAR Index "overstates railroad costs by 25% by basing escalation agreements on 80% of the Index" (Pet. 7 n.6) is simply untrue. These asserted agreements (principally involving a single western carrier) with respect to rate escalation (principally with regard to a single category of traffic—coal moved in unit trains) involved many factors other than rate levels. The fact that a compromise may be negotiated by one railroad, in the case of one commodity, with respect to one component of an escalation formula, does not support any conclusion as to the appropriateness of such an adjustment for measuring the effect of total railroad productivity changes on total railroad costs.

it concluded, "[w]e . . . question the reliability of such measures and as a matter of policy do not believe that their use is justified." (Pet. App. C-6.)

The Court of Appeals, in affirming the Commission's decision, referred specifically to *these* findings *by the Commission* (Pet. App. A-28-29):

> "The crux of *the Commission's rationale* is that available productivity measures are sufficiently unreliable, and the consequences of overestimating productivity growth are sufficiently grave, that it is inappropriate to adjust the cost index on the assumption of continued productivity growth. *The Commission's assessment* of the unreliability of productivity measures finds support in the record." (Emphasis supplied.)

Thus, the Court of Appeals clearly relied upon the Commission's findings in affirming its decision. Petitioners' contention to the contrary is demonstrably incorrect.

3. Petitioners also challenge the Court of Appeals' reference to the Commission's commitment to follow through on its "stated intention to review the index against current cost data, taking appropriate action in the event of overrecovery. . ." (Pet. App. A-31.) Petitioners contend that the Commission's statement of intention "is a far cry from a commitment to determine whether the AAR Index overstates cost increases and to take action in the event of overrecovery." (Pet. 8.)

Petitioners' dissatisfaction with the court's asserted misreliance on the Commission's stated intentions is baseless. The court's reference to the Commission's intention was not central to the court's decision, which was primarily founded on the court's conclusion that the cost indexing procedures adopted by the Commission were reasonable. Moreover, Petitioners' dissatisfaction is irrelevant because the Commission has now commenced a proceeding by issuing a notice of proposed rulemaking deal-

ing specifically and solely with the productivity issue, Ex Parte No. 290 (Sub-No. 4), *Railroad Cost Recovery Procedures—Productivity Adjustment.* As part of that notice, the Commission requested "comments on the possible use of the productivity adjustment in determining the quarterly rail cost adjustment factor and proposals for measuring productivity and for implementing a productivity adjustment." (Pet. App. E-3.) The Commission is receiving comments on the productivity issue through October 25, 1982.

Thus, whether the ICC's statement of its intentions was a binding commitment or not, the Commission *is following through* on that statement. Whether Petitioners or any other party will be satisfied by the Commission's decision is, of course, entirely speculative. However, the Commission is clearly living up to its commitment to review the current index and to afford all interested parties an opportunity to submit evidence and argument with respect to the productivity issue.

4. Finally, Petitioners argue that the present case is of "supreme importance" to shippers of commodities "that are captive to the railroads." (Pet. 9.) In support of this point, Petitioners present an *entirely hypothetical* set of numbers (Pet. 9-10) generated on the assumption that the cost index used by the Commission is and will continue to be 25 percent higher than "actual costs."

Petitioners' assertion concerning the importance of this case to shippers is contradicted by the fact that only one of the eleven sets of shippers who challenged the Commission's decision in the Court of Appeals has sought review of that court's decision here. Moreover, Petitioners' assumption that the cost index used by the Commission has overstated, and will continue to overstate, costs by 25 percent is not based on anything in the record. Nor is Petitioners' chart showing the asserted consequences of such alleged overstatement a part of the record. Indeed, to the extent that Petitioners' hypothetical rests on the as-

sumption that the index used by the Commission has overstated costs by 25 percent, the hypothetical is *contradicted* by the record.[13]

CONCLUSION

Petitioners' arguments clearly do not warrant grant of a writ of certiorari under the standards established by Rule 17 of the Rules of this Court. The issue of whether the Commission should make a productivity adjustment in determining the quarterly rail cost adjustment factor is the subject of a special rulemaking proceeding currently being conducted by the Commission. Moreover, the contentions that the court below erred in affirming the Commission's decision are based not on legal arguments but on factual assertions which are both unsupported by the record and wrong.

For those reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[13] *See* footnote 11 *supra* at 13-14.